

2008

Key Bank National Association v. Wayne R. Weston : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KEY BANK NATIONAL ASSOCIATION,

Plaintiff/Appellee,

vs.

WAYNE R. WESTON,

Defendant/Appellant.

Appeal No. 20080511-CA
District Court No. 060403535

BRIEF OF APPELLEE

Appeal from the Order and Judgment Entered May 6, 2008
By the Fourth Judicial District Court, Utah County
The Honorable Gary D. Stott, Presiding

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ORAL ARGUMENT NOT REQUESTED

FILED
UTAH APPELLATE COURTS

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PARTIES TO THE PROCEEDINGS BELOW

1. The plaintiff-appellee is Key Bank National Association, referred to herein as “Key Bank.”

2. The defendant-appellant is Wayne R. Weston, referred to herein as “Mr. Weston.”

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STATEMENT OF JURISDICTION

Pursuant to *Utah Code Ann.* §78-2a-3(2)(j) and §78-A-4-103(2)(j), and the Order from the Utah Supreme Court dated July 10, 2008, this Court has jurisdiction over this appeal from the Order and Judgment entered by the district court on or about May 6, 2008.

ISSUES PRESENTED FOR REVIEW

Key Bank offers the following statement of issues in lieu of that contained on page one of the Brief of Appellant:

ISSUE NO. 1: Whether the district court correctly ruled that Mr. Weston personally contracted with Key Bank when he opened a Preferred Credit Line from Key Bank, thereafter borrowed money made available to him by Key Bank pursuant to the terms of the Preferred Credit Line Agreement and thereafter refused to repay the money he borrowed.

ISSUE NO. 2: Whether the district court correctly ruled that Mr. Weston was personally obligated to repay the Preferred Credit Line debt pursuant to the January 21, 2000 Commercial Guaranty.

ISSUE NO. 3: Whether the district court correctly denied Mr. Weston's Motion to Strike the Affidavit of Helen M. Rozich.

ISSUE NO. 4: Whether the district court correctly awarded attorney's fees and costs to Key Bank following the court's grant of summary judgment to Key Bank.

Mr. Weston appeals from a summary judgment. Key Bank is satisfied with Mr. Weston's recitation of the applicable standard of review for each of the foregoing issues.

STATEMENT OF THE CASE

This case arises from Mr. Weston's refusal to repay money that he borrowed from Key Bank pursuant to a Preferred Credit Line.

STATEMENT OF FACTS

1. Factual History

Early in 2000, Mr. Weston contacted Key Bank by telephone and applied for a Preferred Credit Line. R. 209-212 (*Weston Depo.* 174:18-22; 178:15-22; 187:1-3). Mr. Weston owns and operates a small used car business called May Corporation d/b/a Autocraft. R. 226 (*Weston Depo.* 42:1 - 44:17). On or about January 21, 2000, Mr. Weston executed a Commercial Guaranty, in which he personally guaranteed all existing and future indebtedness of May Corporation to Key Bank. R. 181, R. 172-74.

The Preferred Credit Line was a loan product offered by Key Bank solely and exclusively to individuals. R. 181, 165-70. The Preferred Credit Line was never offered to businesses or organizations. *Id.* Key Bank never extended a Preferred Credit Line to a business. R. 181. In order to provide greater flexibility and convenience to its borrowers, Key Bank accepted applications for Preferred Credit Lines over the telephone and without a signed contract. R. 180. In lieu of a signed contract, Key Bank provided borrowers with a Preferred Credit Line Agreement, which clearly stated that use of the Preferred Credit Line constitutes acceptance of the terms of the Preferred Credit Line Agreement. R. 180, 189-90.

To obtain the Preferred Credit Line, Mr. Weston contacted Key Bank via telephone and provided the bank with personal financial information such as social

security number, home address, and employment history. R. 180. Based upon his telephone application and the information provided, Mr. Weston was granted a personal Preferred Credit Line with a credit limit of thirty thousand dollars (\$30,000.00). R. 181, 95-164, R. 209-213 (*Weston Depo.* 169: 23 - 174: 22; 178:15-22; 187:1-3).

The Preferred Credit Line was opened exclusively in the name of Wayne Weston. R. 155-163, R. 211 (*Weston Depo.* 177:14-17 “I acknowledge that a preferred line of credit was sent to me in the name of Wayne Weston.”; 177:24 – 178-2¹). After opening the Preferred Credit Line, Key Bank mailed Mr. Weston a book of checks and a copy of the Preferred Credit Line Agreement to the home address Mr. Weston had provided. R. 180, 212 (*Weston Depo.* 173:12-13). The Preferred Credit Line Agreement expressly stated that by opening the Preferred Credit Line, the borrower [Mr. Weston] accepted the terms and conditions of the Preferred Credit Line Agreement and assumed responsibility to repay all credit extended pursuant to the Preferred Credit Line. R. 189-90. The Preferred Credit Line Agreement also stated that subject to the terms of the Agreement, Key Bank would make advances from time to time at the request of the borrower, which advances could be requested at any branch location or by negotiating the convenience checks mailed with the Agreement. *Id.*

¹ Q. When **you negotiated and obtained** the preferred line of credit, it undisputedly came in the name of Wayne Weston?

A. **That’s correct.**

(Emphasis added).

The book of convenience checks mailed to Mr. Weston along with the Preferred Credit Line Agreement bore only the name of Wayne Weston in the payor section. R. 179, 187, 212 (*Weston Depo.* 173:1-13; 178:3-14).

Below Mr. Weston's name appeared his home address of 303 West 100 North, Provo, Utah, as he had represented it to Key Bank.² *Id.* The checks contained no reference whatsoever to May Corporation or any other business entity. *Id.* Mr. Weston admitted that he received the book of convenience checks based upon his negotiation with Key Bank for a loan to Wayne Weston. R. 210-212 (*Weston Depo.* 173:14-17). Despite receiving the checks which bore only his personal name, Mr. Weston admitted that he never contacted Key Bank to verify whether the Preferred Credit Line was opened under the name of May Corporation. R. 212 (*Weston Depo.* 174:18 - 176:4).

² Mr. Weston argues on appeal, as he did in the proceeding below, that this address was not in fact, his home address. However, in Mr. Weston's deposition, he admitted that this was his home address in an unsolicited response.

Q. – a book of blank checks?

A. Yeah.

Q. And in the top left corner would have been your name?

A. Yes. Not my full name, just my name, Wayne Weston.

Q. **Not anything else?**

A. **Well, the address.**

Q. **And your address, okay.**

A. **The home address.**

R. 212 (*Weston Depo.* 173: 4-13) (Emphasis added). Furthermore, Mr. Weston never denied having provided the address at issue to Key Bank and representing that it was, at that time, his home address. Mr. Weston's deposition testimony changed frequently and he often contradicted himself to offer whatever testimony he felt best benefited him at the time of his response.

Mr. Weston admitted that he knew the difference between company and personal checks as company checks always bear the name and address of the company whereas personal checks bear only the name and address of the individual payor(s). R. 211, (*Weston Depo.* 179:6 - 180:5). Despite this knowledge, Mr. Weston also admitted that he never contacted Key Bank to have the checks or the Preferred Credit Line modified to reflect or at least include any reference whatsoever to May Corporation. R. 211-213. Mr. Weston drew advances from the Preferred Credit Line and negotiated the convenience checks under his personal name only. *Id.*, see also R. 93, 187; R. 205, 209 (*Weston Depo.* 185:16-18; 201:3 - 202:4). Mr. Weston baldly offered that he entered into the Preferred Credit Line and took advances against the credit line with the dubious and alleged unilateral “intent” to act on behalf of May Corporation.³ However, the record

³ Q. Did you ever contact Key Bank to find out why they sent you this book of checks?

A. No. Because we had negotiated for a loan which was a result of conversation, and the money went into the corporation, which is Wayne Weston.

Q. Let’s unpack that a little bit. When you say “we negotiated a loan,” who’s we?

A. We as the bank.

Q. And you, Wayne Weston.

A. Wayne Weston as secretary/treasurer of May Corporation.

Q. Did you indicate you were Wayne Weston calling on behalf of May Corp. as the secretary and treasurer and that May Corp. would like to get a loan from the bank?

A. The **financial statements** that I sent on the top say May Corporation.

....

Q. That’s not the question. The question is, the checks that you received from Key Bank - -

A. Okay. They don’t say anything about May Corporation on it, **but there’s an**

makes clear that Mr. Weston's doubtful "intent" was never communicated to Key Bank. Indeed, the only arguable communication of this purported "intent" to bind only May Corporation did not reach Key Bank until after all funds were advanced and after the commencement of Key Bank's lawsuit. R. 212. Further, Mr. Weston presented no evidence whatsoever that would demonstrate that his alleged "intent" to bind May Corporation and not Mr. Weston was ever the subject of any mutual assent.

Mr. Weston admitted that he took advances on his Preferred Credit Line by negotiating several of the convenience checks sent to him and that in doing so; he signed only his personal name. *Id.*, see also R. 93, 187; R. 205, 209 (*Weston Depo.* 185:16-18; 201:3 - 202:4). Key Bank's records also conclusively demonstrated that Mr. Weston also took advantage of visiting a Key Bank branch location and having a bank counter check drawn and made payable into a joint checking account held by Mr. Weston and his wife. *Id.* In each and every instance where Mr. Weston obtained an advance against his Preferred Credit Line by way of a check, he executed and negotiated the checks personally and by signing only "Wayne Weston" or "Wayne R. Weston." *Id.* During his deposition, Mr. Weston went so far as to argue that he acted in a corporate capacity when he signed checks as Wayne Weston and personally when he signed as Wayne "R" Weston. R. 204 (*Weston Depo.* 207:1 - 18). It is undisputed that Mr. Weston did not negotiate either the convenience checks or the counter check in the name of May

intent.

R. 212 (*Weston Depo.* 174: 18-25; 175:1-9; 176:1-4) (Emphasis added).

Corporation or with any designation/distinction of his official capacity with May Corporation. *Id.*

Key Bank issued all invoices on the Preferred Credit Line in the name of Wayne Weston with no reference whatsoever to May Corporation. R. 180, 95-163. The invoices were mailed each month to the address Mr. Weston had provided to Key Bank as being his home address. R. 179. Years later and after being advanced nearly all of the money available under the Preferred Credit Line, Mr. Weston or someone acting on his behalf contacted Key Bank and requested that they change the invoices to be addressed “Wayne Weston c/o May Corporation.” R. 178; see also R. 210 (*Weston Depo.* 181:3 – 182:2).

Regarding funds advanced by Key Bank pursuant to the Preferred Credit Line, Mr. Weston admitted that the advanced funds were never paid directly by Key Bank to May Corporation and were never made available by Key Bank directly to May Corporation. R. 209 (*Weston Depo.* 185:16 – 187: 3). In each instance where money advanced to Mr. Weston from the Preferred Credit Line ended up in a May Corporation account, Mr. Weston independently acted as a necessary intermediary to transfer the money from his personal Preferred Credit Line account and into a separate May Corporation business checking account. R. 93, 188.

Mr. Weston admitted that he used his personal money to fund his business and that he used money from the Preferred Credit Line to fund his business. R. 221 (*Weston Depo.* 139:25 – 140:12); R. 193-96. Specifically, Mr. Weston admitted that he sometimes deposited his money into May Corporation’s business account in order to satisfy May Corporation’s corporate debts. *Id.* One example of this practice was

illustrated to the district court by convenience check No. 1001, where Mr. Weston took an advance on his Preferred Credit Line to infuse ten thousand dollars into Autocraft, a d/b/a of May Corporation. R. 187, 205 (*Weston Depo.* 201:1 – 202:6, 205:6-18).

The undisputed evidence also clearly revealed that Mr. Weston took advances on his personal Preferred Credit Line for non-business related reasons. In April of 2004, Mr. Weston personally negotiated and endorsed a convenience check drawn on the Preferred Line of Credit in the amount of four thousand five hundred dollars, which amount was roughly all that remained available on his thirty-thousand dollar Preferred Credit Line. R. 179, 93, 203-04 (*Weston Depo.* 208:2 – 210:16). Mr. Weston deposited that check into a different checking account owned jointly by Mr. Weston and his wife. *Id.* While Mr. Weston's often self-contradictory deposition testimony attempted to refute this fact, the undisputed business records and invoices from both the Preferred Credit Line and Mr. Weston's Zion's bank account undisputedly evidence that this money was paid from the Preferred Credit Line into Mr. Weston's personal joint checking account. *Id.*

Shortly after being advanced the last bit of available credit, Mr. Weston or someone acting on his behalf contacted Key Bank and requested that Key Bank modify the invoices to add "c/o May Corporation" under Mr. Weston's name. R. 178. In order to ensure proper mailing, Key Bank honored Mr. Weston's request to modify the invoices but that action did not nullify Mr. Weston's personal indebtedness to Key Bank pursuant to the Preferred Credit Line. *Id.* Shortly after the invoices were modified, Mr. Weston ceased making payment on the Preferred Credit Line and then defaulted on the credit

line. *Id.* Mr. Weston did not contest that the default sum was \$28,078.44 as of December 13, 2006, with interest thereon at the statutory rate.

2. Procedural History-

Key Bank strongly objects to that portion of Mr. Weston's Statement of the Case which purports to objectively depict the disposition of the district court on Key Bank's Motion for Summary Judgment and Mr. Weston's Motion to Strike the Affidavit of Helen M. Rozich. Mr. Weston's account mischaracterizes the district court's actions below. Further, Mr. Weston's account provides an incomplete explanation of the district court's analysis and the reasoning behind its decisions in this case.

Based upon evidence produced during discovery, Key Bank motioned the district court for summary judgment on or about February 5, 2008. R. 186. In support of its Motion for Summary Judgment, Key Bank filed a Memorandum of Points and Authorities in Support of Motion for Summary Judgment and the Affidavit of Helen M. Rozich. R. 259 and 182 respectively. Attached as exhibits to Key Bank's Memorandum of Points and Authorities in Support of Motion for Summary Judgment was the full deposition transcript of Mr. Weston (R. 239), Mr. Weston's Answer to Key Bank's First Set of Interrogatories, Request for Admissions and Request for Production of Documents (R. 196), the Preferred Credit Line Agreement (R. 190), and a copy of convenience check No. 1001 (R. 187). The January 21, 2000 Commercial Guaranty, Preferred Credit Line information sheet, all invoices regarding Mr. Weston's Preferred Credit Line and a copy of Key Bank counter check No. 594639702 (from which Mr. Weston advanced roughly

the last four thousand five hundred dollars from his Preferred Credit Line before defaulting on the same) were attached as exhibits to the Affidavit of Ms. Rozich.

Key Bank motioned for summary judgment on several grounds. R. 184-186. Key Bank's first argument was that the undisputed facts of the case established that Mr. Weston contracted with Key Bank for the Preferred Credit Line and that Mr. Weston had breached that contract by refusing to repay the amount borrowed pursuant to the Preferred Credit Line. *Id.* The Second argument was that Mr. Weston was liable to Key Bank on Key Bank's alternative claim of quantum meruit in the event the district court did not conclude that an enforceable express contract was created. *Id.* Finally, Key Bank argued that even if the district court agreed with Mr. Weston that the debt owed on the Preferred Credit Line was a May Corporation obligation, Mr. Weston was still personally obligated to repay the debt by virtue of the January 21, 2000 Commercial Guaranty. *Id.* Key Bank argued that it was entitled to an award of attorney's fees on three separate grounds: first, the Preferred Credit Line Agreement; second, the Commercial Guaranty; and third, pursuant to *Utah Code Ann.* § 78-27-56 for Mr. Weston's bad-faith conduct. R. 243.

In his Memorandum in Opposition to Key Bank's Motion for Summary Judgment, Mr. Weston denied personal liability on the Preferred Credit Line despite his undisputed personal use of the Preferred Credit Line and personal advances thereon. As his defense to Key Bank's claim of personal liability, Mr. Weston further argued that the extension of the Preferred Credit Line undisputedly formed a contract between May Corporation and Key Bank. R. 301. Specifically, Mr. Weston argued and admitted that, "Defendant [Mr.

Weston] does not deny the existence of an express contract between Plaintiff [Key Bank] and May Corporation.” *Id.*

After arguing that the Preferred Credit Line was clearly May Corporation’s corporate liability, Mr. Weston sought to distance himself from the inevitable personal liability which would result from May Corporation’s default in repaying the Preferred Credit Line pursuant to the January 21, 2000 Commercial Guaranty. Mr. Weston baldly asserted that the January 21, 2000 Commercial Guaranty had been abrogated in a subsequent settlement between Key Bank and Mr. Weston. R. 295. However, Mr. Weston offered no evidence that even remotely supported his contention of abrogation and settlement. R. 295-96. Mr. Weston offered only unsigned settlement documents pertaining to a wholly separate and unrelated transaction and set of commercial guaranties. R. 299-300. Mr. Weston’s abrogation argument was flatly rejected by the district court as evidenced by the district court’s disposition and ruling. R. 399-401; *First Supp. Index*, p. 461, *Hrg. Tran.* P. 21.

The only argument Mr. Weston raised in his brief with respect to attorney’s fees, was that there was no “bad faith” and therefore no entitlement to an award of attorney’s fees pursuant to *Utah Code Ann.* § 78-27-56. R. 297. Mr. Weston did not dispute that attorney’s fees were recoverable in the event that Key Bank prevailed on its claim under either the Preferred Credit Line Agreement or the January 21, 2000 Commercial Guaranty. *Id.*

Mr. Weston also opposed Key Bank’s Motion for Summary Judgment by filing a separate Motion to Strike the Affidavit of Helen M. Rozich on the grounds that the

Affidavit lacked foundation and contained inadmissible hearsay. R. 315, 320. In making his argument, Mr. Weston incorrectly alleged that Ms. Rozich did not identify or produce the documents upon which her affidavit was based. R. 315. In its Memorandum in Opposition to Mr. Weston's Motion to Strike the Affidavit of Ms. Rozich, Key Bank explained that the documents relied upon by Ms. Rozich were documents kept by Key Bank in the ordinary course of business and were previously produced to Mr. Weston on two separate occasions during discovery. R. 348-350. Furthermore, the majority of the documents she relied upon were in fact, attached as exhibits to her Affidavit. *Id.*

On March 31, 2008, the district court entertained argument on Key Bank's Motion for Summary Judgment and Mr. Weston's Motion to Strike the Affidavit of Helen M. Rozich. R. 359. The district court granted Key Bank's Motion for Summary Judgment and denied Mr. Weston's Motion to Strike from the bench. *Id.* The transcript from hearing shows that the district court found that, "Mr. Weston personally took advantage of that line of credit [the Preferred Credit Line], obtained the funds." *First Supp. Index*, p. 461, *Hrg. Tran.* P. 25. "The money was used by him [Mr. Weston], was deposited into his own banking account, and is due and owing and payable to Key Bank; and their motion for summary judgment is well taken." *Id.* "Even though the checks show what Mr. Dalton argues is a corporate address, everything else demonstrates personal use." *Id.* "The address issue that has been raised is not sufficient for me to find that it's a corporate obligation rather than a personal obligation for which Mr. Weston is responsible." *First Supp. Index*, p. 461, *Hrg. Tran.* P. 26. "I do not find that there are genuine issues of

material fact nor iss- - (sic) nor questions of law that would defeat the motion that has been filed.” *Id.*

Following the hearing, Key Bank submitted to Mr. Weston a proposed Order and Judgment in conformity with what Key Bank understood from the district court’s bench ruling. Mr. Weston objected to the proposed Order and Judgment on the grounds that he did not recall the district court ruling on Mr. Weston’s hearsay objection to the Rozich Affidavit. R. 371. Mr. Weston also objected to the proposed Order and Judgment by arguing that there was no basis in the district court’s ruling for an award of attorney’s fees and costs to Key Bank. *Id.*

In his Objection to the proposed Order and Judgment, Mr. Weston impermissibly offered new argument not raised in his previous briefing or argument. *Id.* Specifically, Mr. Weston argued for the first time in his Objection that he had never received the Preferred Credit Line Agreement. Mr. Weston went so far as to allege that Key Bank actually conceded that the Preferred Credit Line Agreement was never delivered to Mr. Weston. *Id.* Key Bank made no such concession and Key Bank’s briefing and the Affidavit of Helen M. Rozich squarely and overtly contradict this assertion. R. 255; R. 211-213; 392-93. In a particularly underhanded move, Mr. Weston also directed the district court to a portion of his deposition transcript that had nothing to do with the Preferred Credit Line Agreement, but which Mr. Weston referenced in order to make it appear as if the Preferred Credit Line Agreement was internal to Key Bank and never

sent to Mr. Weston.⁴ In his Brief, Mr. Weston has attempted to perpetrate the same ruse on this Court. *Brief of Appellant*, p. 17.

In its bench ruling, the Court did not expressly mention Key Bank's claim on the Commercial Guaranty. *Id.* That does not mean, however, that "Key Bank's claim on the Commercial Guaranty formed no part of the trial court's ruling" as represented by Mr. Weston in his appellate Brief. *Brief of Appellant*, p. 15. In fact, the opposite is true. In its Ruling which followed the filing of Mr. Weston's Objection to Key Bank's proposed Order and Judgment, the district court specifically addressed the Commercial Guaranty based claim and confirmed that Key Bank was entitled to its claim against Mr. Weston on this alternative ground. R. 399-400. The district court stated, "there were three Commercial Guaranties involved in this action, two of which were abrogated. The final

⁴ The Deposition Exhibit No. 3 referenced in Mr. Weston's deposition transcript is, in fact, Exhibit B to the Affidavit of Helen M. Rozich and is an internal Key Bank document designed to assist its employees explain the function and utility of the Preferred Credit Line offered by Key Bank. This internal document specifically states that Preferred Credit Lines are only offered to individuals as an unsecured personal line of credit. This document is not the *Preferred Credit Line Agreement* that Key Bank sends to all customers together with the convenience checks upon the opening of a Preferred Credit Line. Furthermore, the record clearly shows that this internal Key Bank informational statement was not attached in any form to Key Bank's Memorandum of Points and Authorities in Support of Motion for Summary Judgment. To the contrary, the record clearly shows that Exhibit "B" to Key Bank's Memorandum of Points and Authorities in Support of Summary Judgment was the actual *Preferred Credit Line Agreement*, which was undisputedly mailed to Mr. Weston together with the convenience checks that he admittedly used in order to take advances against his Preferred Credit Line. In his deposition, Mr. Weston stated that he had never seen the internal Key Bank document, which described the Preferred Credit Line, **not that he had not received the Preferred Credit Line Agreement**. Ms. Rozich averred that the Preferred Credit Line Agreement was sent together with the convenience checks. R. 255; 392-93. Mr. Weston never disputed that he received the Preferred Credit Line Agreement and he cannot do so now.

one remains in force. It required attorney's fees as well; therefore, [Mr. Weston] is liable for reasonable attorney's fees as he contracted to be in both agreements." R. 399; see also R. 393. In short, by way of its clarifying Ruling, the district court informed Mr. Weston that the court did not buy into the argument that the January 21, 2000 Commercial Guaranty was ever abrogated. In light of the briefing, argument, and the Court's subsequent Ruling, Mr. Weston's current allegation that "the trial court (evidently) hung its ruling on one of the Commercial Guaranties given by May Corporation or Weston's Wife" has absolutely no basis whatsoever. See *Brief of Appellant*, p. 18. Mr. Weston makes this allegation solely to obfuscate the simple and incontrovertible fact that the lower court held that the January 21, 2000 Commercial Guaranty remained in force against Mr. Weston as was briefed and argued by Key Bank.

Based upon the foregoing, on or about May 6, 2008, the district court entered its Order and Judgment from which Mr. Weston takes his immediate appeal.

SUMMARY OF THE ARGUMENT

The district court's summary judgment in favor of Key Bank should be affirmed because the district court correctly held that the material facts were undisputed and sufficiently evidenced that Mr. Weston was personally obligated on the Preferred Credit Line as a matter of law. The district court correctly found that Mr. Weston "personally took advantage of the line of credit [and] obtained the funds." The district court also correctly held that none of Mr. Weston's arguments was sufficient to create any genuine issue of material fact and preclude summary judgment. The issues of whether Mr.

Weston provided Key Bank with his home or business address and whether Key Bank possessed Mr. Weston's social security number did not create any issues of material fact.

The district court's summary judgment in favor of Key Bank should be also affirmed because the district court correctly held that Mr. Weston failed to provide any evidence that the January 21, 2000 Commercial Guaranty had been abrogated. Under the January 21, 2000 Commercial Guaranty, Mr. Weston is obligated to repay all sums advanced under the Preferred Credit Line, even assuming *arguendo* that the sums were advanced to May Corporation. Even on appeal, Mr. Weston continues to aver that the evidence undisputedly shows that the Preferred Credit Line was opened in the name of May Corporation. ("THE EVIDENCE SHOWS THAT THE PREFERRED LINE OF CREDIT WAS OPENED IN THE NAME OF MAY CORPORATION, NOT WESTON" *Brief of Appellant*, p. 20 (Emphasis in original)). Accepting Mr. Weston's admission and affirmative representation that the Preferred Credit Line was an express contract between Key Bank and May Corporation, Mr. Weston is undisputedly obligated to repay the Preferred Credit Line debt based upon the January 21, 2000 Commercial Guaranty, which the facts conclusively demonstrate was never abrogated.

The district court's denial of Mr. Weston's Motion to Strike the Affidavit of Helen M. Rozich should also be affirmed because the district court correctly held that the subject affidavit contained sufficient foundation and fell within the admissibility requirement of *Utah R. Evid.* 803(6).

The district court's award of attorney's fees and costs should be affirmed because the district court correctly held that an award of attorney's fees and costs was warranted

by operation of the Preferred Credit Line Agreement and the January 21, 2000 Commercial Guaranty.

ARGUMENT

I. THE DISTRICT COURT SHOULD BE AFFIRMED BECAUSE MR. WESTON IS PERSONALLY OBLIGATED TO REPAY THE ADVANCES HE PERSONALLY RECEIVED FROM HIS PREFERRED CREDIT LINE WITH KEY BANK.

The district court properly granted summary judgment in Key Bank's favor because Mr. Weston personally took advantage of the Preferred Credit Line by taking advances against the credit line personally. The *Brief of Appellant* misrepresents the status of the undisputed evidence at issue. The undisputed facts are that: 1) Mr. Weston admitted that he solicited the Preferred Credit Line from Key Bank, 2) Mr. Weston received a book of convenience checks, which bore only the name of "Wayne Weston" and below which appeared the street address that Mr. Weston represented to Key Bank to be his home address, 3) Mr. Weston never disputed receiving the Preferred Credit Line Agreement which accompanied the checks, 4) Mr. Weston negotiated all of the convenience checks and counter checks personally and without any designation or reference whatsoever that he intended to act in any corporate capacity for May Corporation, 5) Mr. Weston deposited certain of the advanced funds into a personal checking account held by Mr. Weston and his wife, 6) Mr. Weston advanced funds from the Preferred Credit Line were never paid directly by Key Bank to May Corporation or made available by Key Bank to May Corporation and in each instance Mr. Weston acted as the necessary intermediary to transfer money out of his Preferred Credit Line and into

the separate and distinct May Corporation account, and 7) Mr. Weston received all invoices on the Preferred Credit Line at his home address and without any reference to May Corporation until *after* Mr. Weston had advanced nearly all funds made available through the Preferred Credit Line. These undisputed facts alone formed a sufficient basis for the district court to hold Mr. Weston personally liable for the sums advanced pursuant to the Preferred Credit Line Agreement.

Mr. Weston repeatedly alleges in his appellate brief that he only acted on behalf of May Corporation when he took advances against the Preferred Credit Line. However, there is absolutely no evidence or testimony to support this allegation. Mr. Weston's occasional deposition references to his unilateral, silent and covert intention to limit his personal liability and bind only May Corporation on the Preferred Credit Line are insufficient as a matter of law. Mr. Weston's dubious intention was clearly hidden from Key Bank. Mr. Weston never expressly manifested his purported intent and there is absolutely no evidence of mutual assent on the part of Key Bank. Mr. Weston's secret understanding and intent of acting as an officer for the corporation is not legally sufficient to avoid liability as a matter of law.

Utah law is overwhelmingly clear that a corporate officer who fails to clearly signify his corporate capacity will be held personally liable. "To relieve an individual signer from liability, the signer's corporate capacity must be clear from the form of the signature." *DBL Distributing, Inc., v. 1 Cache, L.L.C.*, 2006 UT App 400, ¶ 13, 147 P.3d 478, 481; citing *Boise Cascade Corp. v. Stonewood Dev. Corp.*, 655 P.2d 668, 668 n.1 (Utah 1982) (per curiam) ("[W]here it is not clear that a corporate officer signs a contract

in a representative capacity, he is personally liable.”). “Individuals who fail to limit their signatures to their corporate capacity have consistently been held to be directly liable on corporate instruments” *DBL Distributing*, 2006 UT App at ¶ 13; citing *Bushnell Real Estate, Inc. v. Nielson*, 672 P.2d 746, 751-52 (Utah 1983) (holding corporate officers liable on promissory note where they failed to signify their corporate capacity in their signatures); *see also Anderson v. Gardner*, 647 P.2d 3, 4-5 (Utah 1982) (where it is ambiguous whether a corporate officer signed a contract in a representative capacity, he is personally liable); *Starley v. Deseret Foods Corp.*, 93 Utah 577, 74 P.2d 1221, 1223-25 (1938) (corporate secretary who signed corporate promissory note without adding word “secretary” next to signature was personally liable on note).

These cases are analogous to the facts at bar assuming *arguendo* that Mr. Weston did intend to act solely on behalf of May Corporation. Mr. Weston is personally liable for the Preferred Credit Line debt because he never once expressly manifested any intent to act on behalf of May Corporation relative to the advances he took against the Preferred Credit Line.

II. THE DISTRICT COURT CORRECTLY RULED THAT MR. WESTON WAS PERSONALLY OBLIGATED TO REPAY THE PREFERRED CREDIT LINE DEBT PURSUANT TO THE JANUARY 21, 2000 COMMERCIAL GUARANTY.

The January 21, 2000 Commercial Guaranty signed by Mr. Weston and attached as Exhibit A to the Affidavit of Helen M. Rozich clearly and unambiguously guaranteed “any and all of [May Corporation’s] obligations, debts, and indebtedness to [Key Bank] now existing or hereinafter incurred or created” R. 172-74. This Guaranty was legally enforceable and remained in full force and effect throughout the duration of Key

Bank's extension of the Preferred Credit Line and through Mr. Weston's default thereunder. See generally *Cessna Finance Corp. v. Meyer*, 575 P.2d 1048 (Utah 1978) (continuing guaranty enforceable). The enforceability and sufficiency of the January 21, 2000 Continuing Guaranty was not an issue raised below, and is therefore not at issue in this appeal. The only issue raised below and at issue on appeal is whether the January 21, 2000 Commercial Guaranty was abrogated by Key Bank and Mr. Weston. The undisputed facts evidence that the Guaranty was never abrogated. Therefore, it remained enforceable against Mr. Weston, and Mr. Weston is answerable at law to Key Bank for any and all debt incurred by May Corporation and owed to Key Bank.

In his Memorandum in Opposition to Key Bank's Motion for Summary Judgment, Mr. Weston alleged that the January 21, 2000 Commercial Guaranty had been abrogated by a subsequent transaction and settlement. R. 300-01. Mr. Weston alleged that the purported abrogation was evidenced by subsequent transactional documentation, guaranties and a Stipulation included with the Affidavit of Wayne Weston and attached as Exhibit "B" to his Memorandum in Opposition. See R. 260-284. However, even a limited review the transactional documents, guaranties, and *draft* settlement documents included with Mr. Weston's Affidavit reveals that these documents undisputedly pertain to a completely separate and unrelated transaction. They have nothing to do with the January 21, 2000 Commercial Guaranty.

First, the documents referenced by Mr. Weston and included with his Affidavit made no reference whatsoever to the January 21, 2000 Commercial Guaranty. *Id.* Second, the *draft* Stipulation and Settlement Agreement included with these documents

specifically and expressly identified which promissory notes and commercial guarantees were at issue and were to be abrogated by the proposed Settlement Agreement. R. 267. Pursuant to the terms of the *draft* Settlement Agreement, the only Commercial Guarantees to be abrogated in the settlement were the July 30, 2003 Commercial Guarantees signed by Mary Beth Weston and May Corporation, respectively. *Id.* Mr. Weston is fully aware that there has never been any credible or legitimate evidence that the January 21, 2000 Commercial Guaranty was abrogated. Mr. Weston's persistence in maintaining this clearly erroneous argument where there is clearly no evidence to support the same is highly suspect and only confuses the straightforward facts and issues.

Because the January 21, 2000 Commercial Guaranty was never abrogated, it remained in effect and enforceable against Mr. Weston, personally. Thus, accepting as true Mr. Weston's repeated contention and argument that the Preferred Credit Line was a contract between Key Bank and May Corporation, Mr. Weston undisputedly remained liable thereon pursuant to the January 21, 2000 Commercial Guaranty.

Summary judgment may be affirmed 'on any ground available to the trial court, even if it is one not relied on below.'" *Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993). Thus, even if the district court did not rely on this ground, the Court of Appeals may affirm on this ground and indeed should do so in this case. Moreover, if summary judgment is affirmed on this ground, this Court's review of the district court's denial of Mr. Weston's Motion to Strike the Affidavit of Helen M. Rozich is moot as the Affidavit of Helen M. Rozich is unnecessary to establish this claim. Furthermore, if

affirmed on this ground, Key Bank is contractually entitled to recover its attorney's fees and costs pursuant to the terms of the January 21, 2000 Commercial Guaranty.

III. THE DISTRICT COURT CORRECTLY DENIED MR. WESTON'S MOTION TO STRIKE THE AFFIDAVIT OF HELEN M. ROZICH.

On appeal, Mr. Weston reiterates his argument that the Affidavit of Helen M. Rozich should have been stricken for a purported lack of foundation and because it contained inadmissible hearsay. *Brief of Appellant*, p. 25-27. Key Bank in turn, reiterates its argument that this issue was not properly presented to the district court and therefore not preserved for appeal as Mr. Weston failed to set forth any argument or authority in the district court proceeding upon which he based his Motion to Strike. R. 353-54. In addition to identifying Mr. Weston's failure to properly preserve and present this issue, Key Bank pointed out in its Memorandum in Opposition to Mr. Weston's Motion to Strike that an adequate foundation was laid for the affidavit testimony of Ms. Rozich and that her testimony was admissible pursuant to *Utah R. Evid.* 803(6).

The documents relied upon by Ms. Rozich in preparation of her Affidavit were clearly identified as documents kept by Key Bank in its ordinary course of business and previously produced to Mr. Weston during fact discovery. R. 355-56. In his Brief, Mr. Weston later conceded that these documents were indeed produced and identified by Key Bank. *Brief of Appellant*, p. 25. Furthermore, these documents consisted of hundreds of pages and included, but were not limited to invoice statements, cashed checks, and computer-generated account status information sheets. *Id.*, see also R. 178-80. Given the sheer volume of the documents and files reviewed by Ms. Rozich, not all of them were

reproduced as exhibits to her Affidavit. Mr. Weston has cited to any authority for the proposition that Ms. Rozich was compelled to produce all documents upon which she relied within, or together with, her affidavit.

Ms. Rozich's review of those Key Bank files and documents identified and discussed above provided her with an ample foundation upon which she based her affidavit testimony. R. 182-4. In her affidavit, Ms. Rozich laid the proper foundation for the admission of her affidavit testimony and by predicated her testimony on her position with Key Bank, Key Bank's course of business dealings, and upon her review of Key Bank's file documentation. *Id.* Ms. Rozich testified that she personally reviewed these documents, and that her inspection of the same was ordinary by virtue of her responsibilities as a collections officer for Key Bank. *Id.* Ms. Rozich was qualified in every respect to lay the foundation for the admission of the documents at issue and her testimony on behalf of Key Bank. Mr. Weston offered nothing to dispute this. R. 315, 353-56.

Moreover, much of the affidavit testimony offered by Ms. Rozich was conceded as undisputed fact by Mr. Weston during his deposition. For example, Mr. Weston himself conceded in his deposition that he had contacted Key Bank and solicited the Preferred Credit Line in or around 2000. R. 211-13. This comports with Key Bank's invoicing and computer records which show the Preferred Credit Line was opened in 2000 as averred by Ms. Rozich. R. 182-84. Furthermore, the documents previously produced by Key Bank, i.e., cashed checks, invoices, and computer generated account status information sheets, all undisputedly establish that the Preferred Credit Line was opened and the first

advance taken by Mr. Weston in 2000. R. 168-72. As a representative for Key Bank, it is not necessary for Ms. Rozich to have been the actual person who conducted the telephone call through which Mr. Weston established his Preferred Credit Line. By virtue of her knowledge of the parameters of the personal Preferred Credit Line program and her thorough review of Mr. Weston's information from within the Key Bank file documents relating to the Preferred Credit Line, Ms. Rozich could adequately determine, and therefore testify that Mr. Weston provided his personal information in connection with his application for the Preferred Credit Line. R. 182-84. The district court properly held that the Affidavit of Helen M. Rozich was based upon adequate foundation. This Court should affirm that ruling.

Mr. Weston does not dispute that the foregoing Key Bank records and documents were in fact, kept in Key Bank's ordinary course of business as outlined in *Utah R. Evid.* 803(6). *Brief of Appellant*, p. 26-27. Furthermore, Mr. Weston offered no evidence or argument to refute Key Bank's averment that the documents produced during discovery and relied upon by Ms. Rozich were kept in Key Bank's ordinary course of business per the requirements of *Utah R. Evid.* 803(6). *Id.* For this reason, this Court should affirm the district court's ruling that the documents and related testimony set forth in the Affidavit of Helen M. Rozich fell within the business exception to the hearsay rule and in turn, affirm the denial of Mr. Weston's Motion to Strike the Affidavit of Helen M. Rozich.

IV. THE DISTRICT COURT CORRECTLY AWARDED ATTORNEY'S FEES AND COSTS TO KEY BANK PURSUANT TO THE PREFERRED CREDIT LINE AGREEMENT, OR ALTERNATIVELY PURSUANT TO THE JANUARY 21, 2000 COMMERCIAL GUARANTY.

The district court correctly awarded attorney's fees and costs to Key Bank following the court's grant of summary judgment. The district court plainly disclosed its basis for the award of attorney's fees and costs as both the Preferred Credit Line Agreement and in the alternative, the January 21, 2000 Commercial Guaranty. R. 399-401. Because the undisputed facts evidence that Mr. Weston personally entered into the Preferred Credit Line Agreement with Key Bank, he is personally liable to Key Bank for all reasonable attorney's fees and costs incurred in collecting his deficient account pursuant to the terms of the Preferred Credit Line Agreement. R. 189-90.

In the alternative, in the event that this Court agrees with Mr. Weston's contention that the Preferred Credit Line formed a contract solely between May Corporation and Key Bank, Mr. Weston is nonetheless liable to repay the debt pursuant to the January 21, 2000 Commercial Guaranty as the Guaranty was never abrogated. R. 172-74. Under either the Preferred Credit Agreement or Guaranty, Mr. Weston is personally liable for all of Key Bank's reasonable attorney's fees incurred in the district court action and on appeal. Accordingly, the district court's award of attorney's fees and costs to Key Bank should be upheld.

CONCLUSION

Key Bank agrees with Mr. Weston on one thing, this was not a close case. Key Bank was entitled to summary judgment for a variety of reasons.

The district court correctly held that the material facts were undisputed and sufficiently evidenced that Mr. Weston was personally obligated on the Preferred Credit Line as a matter of law. Mr. Weston's self-serving but often self-contradicting testimony could not muddy the water enough to create any genuine issues of material fact. The district court correctly found that Mr. Weston personally took advantage of the line of credit and personally obtained the funds from the Preferred Credit Line. The convenience and counter checks signed personally and individually by Mr. Weston and then paid into his various business and personal accounts are enough. Mr. Weston's personal use of the Preferred Credit Line funds is also clearly substantiated by the invoice statements and corroborating bank documents. The issues of personal versus business address and social security number were rightfully treated by the district court as red herrings.

The district court's summary judgment in favor of Key Bank should also be affirmed because the district court correctly held that Mr. Weston failed to provide any evidence to demonstrate that the January 21, 2000 Commercial Guaranty had been abrogated. Even if Key Bank were to concede the first issue on appeal, Mr. Weston would nonetheless be personally liable for the debt based upon Mr. Weston's admission that the Preferred Credit Line debt was incurred by May Corporation and operation of the January 21, 2000 Commercial Guaranty.

The district court's denial of Mr. Weston's Motion to Strike the Affidavit of Helen M. Rozich should be also affirmed because the district court correctly held that the

subject affidavit contained sufficient foundation and fell within the admissibility requirement of *Utah R. Evid.* 803(6).

Finally, the district court's award of attorney's fees and costs should be affirmed because the district court correctly held that an award of attorney's fees and costs was warranted by operation of the Preferred Credit Line Agreement or alternatively under the January 21, 2000 Commercial Guaranty.

Accordingly, Key Bank respectfully requests that the district court's order granting Key Bank summary judgment and order denying Mr. Weston's Motion to Strike the Affidavit of Helen M. Rozich both be affirmed with reasonable attorney's fees and costs awarded to Key Bank on appeal.

DATED this 4 day of January, 2009.



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CERTIFICATE OF SERVICE

I hereby certify that on this 4 day of January, 2009, I caused to be mailed, first-class, postage prepaid, two true and correct copies of the foregoing **BRIEF OF APPELLEE** to:

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